# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1401

BAGEL BAKERS COUNCIL OF GREATER NEW YORK AND ITS EMPLOYER-MEMBERS, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–15a) is reported at 434 F. 2d 684. The Board's decision and order (A. 617–667)[1] are reported at 174 NLRB No. 101.

### JURISDICTION

The judgment of the court of appeals was entered on December 24, 1970 (Pet. App. 16a–21a). The peti-

[1] "A." refers to the Appendix in the court below which we are lodging with the Clerk.

tion for a writ of certiorari was filed on February 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review in upholding the Board's finding that the Council was a multi-employer bargaining unit.

2. Whether substantial evidence supports the Board's finding that the lockout was unlawful in the circumstances of this case.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, 158), provide as follows:

> SEC. 8(a) It shall be an unfair labor practice for an employer— * * *
>
> (3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in a labor organization * * *
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a).

## STATEMENT

The individual petitioners bake and sell bagels in the New York metropolitan area, and each is a member of petitioner Bagel Bakers Council (Pet. App. 3a; A. 620–621, 639–642, 435). For some years, a committee of Council members, headed by Council President Isidore Glass, has negotiated collective bargaining agreements with the unions representing its mem-

ber's bakers (Local 338) and drivers (Local 802) (Pet. App. 2a–3a; A. 620–631). The Council would approve a general contract and then the individual employers would sign separate but identical agreements (Pet. App. 3a; A. 621, 631, 556–570, 593–595, 21–22, 27–28, 64, 80–81, 142, 263–268).

In September 1966, when Local 338 struck three member shops, its complaints were dealt with by the Council, even though the Union protested that its contracts were with individual employers (Pet. App. 3a–4a; A. 623–625). In early October, Council President Glass sent a telegram informing Local 338 that the work stoppage and a slowdown "in our member's shops constitute a breach of the collective bargaining agreement between Local 338 and the * * * Council and its member shops" (A. 571, 624). That telegram further informed Local 338 that unless full work was resumed by a specified date "your members will no longer be deemed employees of our member shops and will not be permitted on the premises of our member shops" (A. 624–625, 571–752). On October 7, 1966, the nonstruck Council members locked out employee members of Local 338 (A. 625). This particular dispute ended in November 1966, with an agreement between Local 338 and the Council (A. 625, 42–43).

On November 29, 1966, Glass wrote Local 338 that the Council elected to exercise its option to terminate the existing contract on January 31, 1967 (Pet. App. 6a; A. 625–626).[2] Between December 19, 1966 and

[2] The Council did not notify the Federal Mediation and Conciliation Service within 30 days after sending a contract termination notice as required by Section 8(d)(3) of the Act (29 U.S.C. 158(d)(3)) (A. 626–627, 643–645, 629–633).

January 31, 1967, the Council and Local 338 held several negotiating sessions (Pet. App. 6a; A. 626, 45). The Council's financial secretary admitted that the Council's bargaining aim was to seek a contract that would be "one for all and all for one" (A. 641–642, 394). Local 338 sought no pay increase, asking only for a two-year extension of the existing contract (Pet. App. 6a; A. 628, 644, 45–48). The Council, claiming that its members were losing money because of increased competition, demanded a 40 percent reduction in labor costs as a condition of a new agreement (Pet. App. 6a; A. 628–629, 46–51, 108–109, 159–163, 165–173). Local 338 replied that it would consider this request on the basis of individually demonstrated need and asked that members losing money allow Local 338 either to examine their books or else present audits in support of their position (Pet. App. 6a; A. 628–630, 645–646, 46–55, 159–173).

On January 13, Council President Glass met with Local 338 negotiators. He admitted that not all of the employers were losing money "but certain of my members want to take advantage of this situation * * * they want this 40 per cent reduction" (Pet. App. 7a; A. 629, 55–57, 175–177). The Union repeated its request for financial statements but none was forthcoming (A. 629–630, 60–62, 178–183). The Council also rejected the Union's proposal for a two-year contract, countering with an offer for "a day-to-day, week-to-week, or at most a month-to-month contract" (Pet. App. 7a; A. 647–648, 47–55, 174).

No agreement having been reached by January 31 (the contract termination date), the Council took the

position "no contract, no work" (Pet. App. 7a; A. 635, 460). Local 338 representatives advised the Council's negotiators that no strike was contemplated; this position was reaffirmed at a membership meeting in the early hours of February 1 (Pet. App. 7a; A. 183–186, 458–460). That same day, when Local 338 members reported to their regular places of employment, they were locked out. Two days later, the Council members resumed operations with new employees and family members (Pet. App. 7a; A. 626, 365–371).

The Board affirmed the Trial Examiner's finding that there was a history that Council members, in negotiating with Local 338, had evidenced an intent to be bound by multi-employer bargaining action through the Council (A. 641–642, 664–665); that the Council had failed to bargain in good faith with Local 338, and that the lockout was in furtherance of its bad faith bargaining posture (A. 665, 645, 648). The Board ordered the Council and its members to cease and desist from engaging in the unfair labor practices, to reinstate the employee members of Local 338 and reimburse them for any loss of earnings (A. 656–660). The court below enforced this part of the Board's order (Pet. App. 1a–15a).[3]

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[3] The Council had developed the practice for several years of reaching an agreement with Local 338 before bargaining with Local 802, representing the drivers. Accordingly, after the Local 338 members were locked out, the drivers were also locked out (Pet. App. 12a). The Board concluded that the lockout of the drivers was also illegal (A. 650–651). The court of appeals denied enforcement of this part of the Board's order on the ground that it was not supported by substantial evidence (Pet. App. 15a). The Board has not sought review of this ruling.

**ARGUMENT**

1. In recognizing the validity of multi-employer bargaining, the court of appeals adopted no novel legal concept. See *National Labor Relations Board* v. *Truck Drivers Local Union*, 353 U.S. 87, 94–96. Nor, as petitioners contend (Pet. 4–5), did the court depart from accepted criteria in upholding the Board's finding that the Council was the bargaining representative. On the contrary, it found adequate "support in the record" for the Board's determination that the individual employers intended to be bound "by group, rather than individual action" and that the Union had accepted the Council as the bargaining unit (Pet. App. 4a–5a). In short, it did no more than adopt the amply supported factual findings made by the Board which had applied proper standards.[4]

2. The contention that the court below erred in upholding the Board's decision that the lockout was illegal is similarly insubstantial. The Board found (A. 665), and the court of appeals agreed, that the lockout was part-and-parcel of the Council's bad faith bargaining position—*i.e.*, its "failure to produce records to support a claimed inability to pay and * * *

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[4] Petitioners quibble over words (Pet. 5) in urging that the standard applied by the court below is contrary to that utilized in *Western States Reg. Coun. No. 3, Int. Woodworkers* v. *National Labor Relations Board*, 398 F. 2d 770, 773–776 (C.A.D.C.). In both cases the courts applied essentially the same test in deciding that the Board was correct in concluding that the employers had formed a multi-employer bargaining unit and that the union had accepted that unit.

its insistence on a contract of unreasonably short duration" (Pet. App. 7a–8a). Nothing decided by this Court in *American Ship Building Company* v. *National Labor Relations Board,* 380 U.S. 300, casts doubt on the validity of this conclusion. In that case this Court upheld the legality of a lockout employed "solely as a means to bring economic pressure to bear in support of the employer's bargaining position"; it distinguished, as unaffected by that holding, a case such as this "where the Board has concluded on the basis of substantial evidence that the employer has used a lockout as a means to injure a labor organization or to evade his duty to bargain collectively," *id.* at 308.

There is finally no merit to the claim that the charges of bad faith related to bargaining which took place subsequent to the lockout, and therefore had no affect on the validity of the lockout (Pet. 7). The Board had ample basis for concluding that the bad faith bargaining took place prior to the lockout (Pet. App. 7a–9a; A. 645–649).[5]

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[5] For the reasons given by the court of appeals (Pet. App. 10a), the Examiner did not abuse his discretion in denying a 30-day continuance to allow Glass to testify. See *National Labor Relations Board* v. *Standard Forge and Axle Company, Inc.*, 420 F. 2d 508, 511–512 (C.A. 5).

Nelson Bakery's rights were fully protected by the court's ruling that it be allowed to present its personal defense at any subsequent compliance proceeding and "that the burden of proof on this issue be the same as if Nelson were defending an unfair labor practice charge" (Pet. App. 11a).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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